



Republic v Public Procurement and Administrative Review Board & 2 others; Air Filter Maintenance Services International (PTY) Ltd (Ex parte Applicant) (Application E299 of 2025) [2025] KEHC 15184 (KLR) (Judicial Review) (27 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15184 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
APPLICATION E299 OF 2025
JM CHIGITI, J
OCTOBER 27, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

THE PUBLIC PROCUREMENT AND ADMINISTRATIVE REVIEW BOARD 1ST RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF HEALTH 2ND RESPONDENT

AMREF HEALTH AFRICA 3RD RESPONDENT

AND

AIR FILTER MAINTENANCE SERVICES INTERNATIONAL (PTY) LTD EX PARTE APPLICANT

JUDGMENT

1. The Application before this Court is the Notice of Motion dated 19th September, 2025. The Application is brought Under Order 53 Rule 3(1) of the Civil Procedure Rules Cap 21 laws of Kenya. It seeks the following orders:

1. That this Honourable Court be pleased to grant the ex-parte Applicant an order of certiorari seeking to remove into this Honourable Court and quash the entire decision of the Public Procurement Administrative Review Board, the 1st Respondent herein, delivered on 2/09/2025 in declining to exercise jurisdiction over tender by the 3rd Respondent under Tender No. Eoi No./amref/ll/02/2025/005-01 For Proposed Design Works, Refurbishment And Equipping Of Biosafety Level 3 (bsl3}and Refurbishment Of Biosafety Level 2 (bsl2}



Laboratories At The National Public Health Laboratory (block-b}for The Division Of Nationallaboratoryservices, Ministryof Health (Re-advertisement}.

2. That this Honourable Court be pleased to grant the ex-parte Applicant an order declaring the rights of parties herein with respect to the 3rd Respondent's Tender No. EOI NO./AMREF/11/02/2025/005-01 for Proposed Design Works, Refurbishment And Equipping Of Biosafety Level 3 (bsl3} And Refurbishment Of Biosafety Level 2 (bsl2} Laboratories At The National Public Health Laboratory(block-b} For The Division Of National Laboratory Services, Ministry Of Health (Re-advertisement} by compelling the 3rd Respondent to declare the ex-parte Applicant as the successful bidder therein having demonstrated capacity to perform the contract within the prescribed timeframe as well as being the bidder with the lowest evaluated financial proposal.
 3. That this Honourable Court be pleased, to grant the ex-parte Applicant an order of mandamus compelling the Public Procurement Administrative Review Board, the 1st Respondent herein, to refund to it the further filing fees of Kshs. 160,000/= unlawfully demanded and paid on 29th September, 2025.
 4. That this Honourable Court be pleased, as an alternative to prayer 2 hereinabove, to grant the ex-parte Applicant an order of mandamus compelling the Public Procurement Administrative Review Board, the 1st Respondent herein, to take up jurisdiction over the 3rd Respondent's Tender No. EOI NO./AMREF/11/02/2025/005-01 for Proposed Design Works, Refurbishment And Equipping Of Biosafety Level 3 (bsl3) And Refurbishment Of Biosafety Level 2 (bsl2} Laboratories At The National Public Health Laboratory (block-b} For The Division Of Nationallaboratoryservices, Ministry Of Health (Re-advertisement) and decide the request for review Application which had been filed before it on its merits.
 5. That this Honourable Court be pleased to grant the ex-parte Applicant an order of mandamus compelling the Public Procurement Administrative Review Board, the 1st Respondent herein, to strike out the substantive responses filed by the 3rd Respondent herein after the lapse of time without leave and proceed with the matter as being unopposed.
 6. That this Honourable Court be pleased to grant the ex-parte Applicant an order of prohibition seeking to stop the 2nd Respondent from further participating in and/ or engaging in procurement processes involving public assets and the 3rd Respondent without having such private entities being licensed by the Public Procurement Regulatory Authority or declaring such procurements to be subject to the jurisdiction of the 1st Respondent.
 7. That there be costs of this Application to be provided for.
2. The Application is supported by a statutory statement dated 19th September, 2025 and Verifying Affidavit of Humphrey Crister Musuluma Lwanba sworn on even date.
 3. The Applicant, moved this Court challenging the decision of the Public Procurement Administrative Review Board (PPARB) rendered on 2nd September 2025 in PPARB Application No. 91 of 2025. The Applicant seeks orders of certiorari to quash the said decision on grounds that the Board declined jurisdiction in respect of a tender dispute involving the 2nd Respondent, AMREF Health Africa, and the 3rd Respondent, the Ministry of Health, in relation to the Expression of Interest for Proposed Design Works, Refurbishment and Equipping of Biosafety Level 3 (BSL-3) and Refurbishment of Biosafety Level 2 (BSL-2) Laboratories at the National Public Health Laboratory (Block B).



4. The Applicant duly participated in the impugned procurement process but was declared unsuccessful by letter dated 29th July 2025. Dissatisfied with that decision, the Applicant lodged a Request for Review before the 1st Respondent on 11th August 2025, which was duly registered as PPARB Application No. 91 of 2025.
5. However, upon first presentation of the Application, the Board's secretariat declined to accept the filing, alleging lack of jurisdiction over Amref Health Africa on account of its private status.
6. The Applicant's counsel protested the rejection, prompting the secretariat to later admit the Application on 14th August 2025, two days after the initial attempt to file.
7. It is further argued that the Applicant paid the requisite filing fees of Kshs. 40,000 and an administrative charge of Kshs. 5,000, as required under the Public Procurement and Asset Disposal Regulations, 2020.
8. It is contended that the initial rejection by the secretariat on grounds of jurisdiction was ultra vires, since such determination lies exclusively within the judicial competence of the Board itself and not its administrative staff. Subsequently, the 3rd Respondent filed a Notice of Preliminary Objection dated 20th August 2025, challenging the competence of the review Application.
9. The Applicant responded by filing written submissions and a supplementary affidavit dated 26th August 2025, arguing that the procurement process in question was public in nature given that it involved government assets and officials. A hearing was then scheduled for 27th August 2025, though it was adjourned twice first to 28th August, and thereafter to 29th August 2025.
10. The Applicant contends that the 3rd Respondent filed its substantive response and accompanying documents after the statutory timelines had lapsed.
11. The said documents revealed that the tender's evaluation committee comprised nine members, five of whom were government officials four from the Ministry of Health and one from the Ministry of Public Works thereby, according to the Applicant, demonstrating government control and a public character in the procurement process.
12. The Applicant further argued that the Board imposed an additional and unlawful filing fee of Kshs. 160,000, contrary to Regulation 207 of the Public Procurement and Asset Disposal Regulations, 2020, which pegs the applicable fee for expressions of interest at Kshs. 40,000. The additional amount was nonetheless paid under protest on 28th August 2025 to avoid exclusion from the hearing.
13. It is alleged that during the proceedings, the Board acted with bias and procedural impropriety by granting the 3rd Respondent's Programme Director, Dr. George Githuka, leave to make oral representations despite being represented by counsel and without having filed any affidavit, while denying a similar opportunity to the Applicant.
14. The Applicant contends that such conduct violated the principles of audi alteram partem and fair administrative action guaranteed under Article 47 of *the Constitution*.
15. According to the Applicant, the impugned decision of 2nd September 2025 held that the Board lacked jurisdiction on the basis that the Applicant had not demonstrated that the 2nd Respondent utilised public assets or that the government exercised controlling interest over it. The Applicant avers that this conclusion was irrational and unreasonable, particularly in light of documentary evidence filed before the Board including the tender re-advertisement showing that the laboratories in issue were public health facilities under the Ministry of Health.



16. The Applicant invokes the test of irrationality as set out in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, citing *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 K.B. 223, asserting that the Board's decision was so illogical and morally untenable that no reasonable tribunal properly directing its mind to the evidence could have arrived at it.
17. The Applicant maintains that the Board ignored material evidence demonstrating government involvement in the tender process and failed to consider the applicable principles of public procurement law, thereby rendering its decision contrary to the doctrines of legality, proportionality, and procedural fairness.
18. The Applicant thus seeks an order of certiorari to quash the Board's decision, and an order directing that the tender evaluation committee admits the Applicant to the final stage of evaluation, or alternatively, that the Applicant be declared the successful bidder.
19. The Applicant further asserts that the matter raises substantial questions of public interest concerning the use of public resources and oversight of public officials in procurement processes, thus meeting the threshold for conservatory relief as articulated by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others* [2013] eKLR.
20. In sum, the Applicant contends that the Board's refusal to assume jurisdiction, coupled with the procedural irregularities and unreasonable conclusions reached therein, rendered its decision unlawful, irrational, and in violation of the Applicant's right to a fair hearing.
21. The Applicant filed Written Submissions and Supplementary Written Submissions dated 30th September, 2025 and 13th October, 2025 respectively.
22. The Applicant contends that the decision of the 1st Respondent dated 2nd September 2025 is unlawful, unreasonable, irrational, and ultra vires, thus meriting quashing by an order of certiorari.
23. It is their case that the 1st Respondent wrongly declined to exercise jurisdiction over the impugned tendering process conducted by the 3rd Respondent, on the mistaken premise that the latter is a private entity and hence outside its statutory purview.
24. The Applicant asserts that credible evidence was presented demonstrating that the tender in question was of a public nature and that the 1st Respondent's refusal to entertain the review Application amounted to dereliction of statutory duty.
25. Relying on *Mombasa ELC Misc. Application No. 90 of 2020 R v Principal Kadhi Mombasa, Murtaza Turabali Patel & Others*, the Applicant submits that the case meets the established thresholds for the issuance of prerogative orders under Sections 8 and 9 of the *Law Reform Act*, Cap. 26, namely that the impugned decision was ultra vires, biased, and arrived at in violation of the principles of natural justice.
26. The Applicant avers that the 1st Respondent exhibited bias and procedural unfairness, as evidenced by its initial refusal to admit the Application, its deliberate alteration of hearing dates to accommodate the 3rd Respondent's late filings, and its arbitrary increment of filing fees from Kshs. 45,000 to Kshs. 160,000 without lawful basis, contrary to the Fifteenth Schedule of the Regulations. These actions, it is contended, demonstrate bad faith and a premeditated intent to frustrate the Applicant's case.
27. Further placing reliance in *Highway Furniture Mart Ltd v Commissioner of Value Added Tax & Another* [2015] KECA 566 (KLR), the Applicant submits that the court's role in judicial review is to ensure that lawful authority is not abused through unfair treatment, unreasonableness, or improper exercise of discretion. It is thus argued that the 1st Respondent's actions constitute an abuse of statutory



- power and an affront to the principles of fair administrative action as enshrined in Article 47 of *the Constitution* and the Fair Administrative Actions Act, 2015.
28. The Applicant further contends that the 1st Respondent's decision was per incuriam binding judicial precedent, as was held in *Republic v Public Procurement Administrative Review Board & 2 Others ex parte Selex Sistemi Integrati* [2008] KEHC 138 (KLR), where the court affirmed that statutory provisions purporting to oust jurisdiction must be construed strictly.
 29. In disregarding this principle, the 1st Respondent, it is argued, failed to appreciate that its jurisdiction emanates from *the Constitution* and the *Law Reform Act*, and not from the *Public Procurement and Asset Disposal Act* (PPADA) alone.
 30. Reliance is also placed on *Republic v Independent Electoral and Boundaries Commission ex parte NASA Kenya & 6 Others* [2017] KEHC 4663 (KLR), where the Court held that a public body's failure to apply its mind to relevant statutory provisions constitutes a reviewable error of law.
 31. The Applicant submits that the 1st Respondent abdicated its duty to adjudicate a dispute clearly falling within its mandate, thereby acting contrary to the legality principle discussed in *Republic v Public Procurement Administrative Review Board & 2 Others ex parte Rongo University* [2018] KEHC 9643 (KLR).
 32. It is urged that the 1st Respondent's refusal to exercise jurisdiction was irrational, unreasonable, and ultra vires, contrary to Articles 10 and 227 of *the Constitution* and Sections 2, 3 and 4 of the PPADA, 2015.
 33. In overlooking evidence showing that the tender related to a national public health laboratory owned by the Ministry of Health, and in holding that no evidence was adduced showing use of public assets, the Respondent, it is argued, acted contrary to reason and public policy, thus meeting the Wednesbury test of unreasonableness as enunciated in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 and *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
 34. The Applicant maintains that the 1st Respondent's decision was "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the matter could have arrived at it."
 35. The Applicant invokes Section 7(2) of the Fair Administrative Actions Act, 2015, arguing that the 1st Respondent's decision was reviewable for bias, procedural unfairness, error of law, bad faith, and failure to consider relevant evidence.
 36. It is the Applicant's submissions that the Respondent's conduct ranging from rejecting filings, irregularly increasing fees, and disregarding clear documentary evidence amounts to an administrative action tainted by illegality, irrationality, and procedural impropriety.
 37. The Applicant also prays that this Court, pursuant to Section 11(1)(a) of the Fair Administrative Actions Act, 2015, declare the rights of the parties and award it the impugned tender directly, asserting that it was the most qualified bidder.
 38. Reliance is placed on *Republic v Public Procurement Administrative Review Board & 2 Others ex parte Akamai Creative Ltd* (JR Misc. Appl. No. 531 of 2015), where the Court held that administrative bodies must furnish reasons for their decisions. It is contended that the 3rd Respondent failed to provide evaluation criteria or reasons for rejection, thereby violating Article 47 of *the Constitution*.



39. The Applicant further relies on *Awuor v Board of Management Nairobi International School* [2025] KEELRC 2528 (KLR) and *William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others* [2016] eKLR, to argue that misjoinder cannot defeat a suit, and on Section 169 of the PPADA, 2015, to demonstrate that the Secretariat of the Review Board has no authority to reject filings on jurisdictional grounds.
40. The Replying Affidavit by the 1st Respondent, it is argued, is incurably defective for not being dated or commissioned, rendering it inadmissible as per *Otieno & Another v IEBC & 2 Others* (Petition E002 of 2022) [2022] KEHC 10054 (KLR).
41. It is the Applicant's submission that the 2nd and 3rd Respondents' contradictory positions each disclaiming responsibility for the procurement process illustrate a deliberate attempt to evade accountability.
42. Placing reliance in *Nguruman Ltd v Jan Bonde Nielsen & 2 Others* [2014] KECA 606 (KLR) and *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others* SCK [2013] eKLR, the Applicant contends that the Respondents' conduct constitutes misuse of public funds, warranting the Court's intervention in the public interest. The Applicant therefore urges the Court to issue the orders sought lest grave prejudice be visited upon it and the Kenyan public through the unlawful award of a tender concerning a critical public health facility to an unqualified entity.

1st Respondent's Case;

43. The 1st Respondent contends, that the Applicant's Notice of Motion challenging the Board's decision of 2nd September 2025 in PPARB Application No. 91 of 2025 is, in substance, an appeal disguised as a judicial review Application and this Court lacks jurisdiction to entertain the matter.
44. The 1st Respondent further avers that, pursuant to Section 175(1) of the *Public Procurement and Asset Disposal Act*, 2015 ("the Act"), the only proper Respondent in judicial review proceedings arising therefrom is the Board itself, and that other parties such as the procuring entity or tenderers ought only to be joined as interested parties. It is therefore contended that the joinder of the 2nd and 3rd Respondents as substantive Respondents renders the Application bad in law for misjoinder.
45. On 12th August 2025, the Applicant filed Request for Review No. 91 of 2025 before the Board challenging the 2nd and 3rd Respondents' decisions relating to Tender No. EOI No./AMREF/11/02/2025/005-01 for the Proposed Design Works, Refurbishment and Equipping of Biosafety Level 3 and Level 2 Laboratories at the National Public Health Laboratory.
46. The Applicant sought, inter alia, the annulment of its disqualification, prohibition against contract execution, nullification of the award to other bidders, and an order compelling re-evaluation and award of the tender to itself.
47. Upon scrutiny of the review request, the Board's Secretariat noted that the 3rd Respondent did not qualify as a public entity within the meaning of the Act.
48. Despite this, the matter proceeded, and following a preliminary objection by the 3rd Respondent challenging the Board's jurisdiction, the Board issued a hearing notice, received submissions from all parties, and conducted a virtual hearing.
49. The Applicant was later required to pay additional filing fees of Kshs. 160,000/= after disclosure that the estimated tender sum was USD 2,000,000, an amount initially withheld.



50. The Board rendered its decision on 2nd September 2025, upholding the 3rd Respondent’s preliminary objection and striking out the request for review for want of jurisdiction, each party bearing its own costs.
51. In arriving at this decision, the Board framed and determined issues relating to the competence of the preliminary objection, the admissibility of responses, and, crucially, whether the procurement constituted “public procurement” within the meaning of Sections 2, 4 and 167(1) of the Act.
52. In its analysis, the Board held that its jurisdiction flows solely from the Act and that, for it to be vested with jurisdiction, the procuring entity must be a public entity utilizing public funds within the framework of the *Public Finance Management Act* and subject to approved budgetary processes.
53. The Board found no evidence that the 2nd or 3rd Respondents had an accounting officer or an approved budget under the Act governing the use of Global Fund grants.
54. It further found that the Global Fund, being a multilateral financing mechanism, operates under a bilateral or multilateral agreement between the Government of Kenya and an external donor, which is expressly exempted from the Application of the Act under Section 4(2)(f).
55. Consequently, the Board held that the 3rd Respondent, AMREF Health Africa, was not a public entity but a non-state implementing agency of the Global Fund, and its collaboration with the Ministry of Health did not render it a public entity or indicate governmental control.
56. The Board also noted that AMREF’s internal procurement policy was distinct from the regime under the Act and Regulations, thereby confirming that the procurement in question did not constitute public procurement.
57. The 1st Respondent thus maintains that its decision was made lawfully, reasonably, and within jurisdiction, having considered all pleadings, submissions, and applicable law, including Article 227 of *the Constitution*, the *Public Procurement and Asset Disposal Act*, 2015, the Public Procurement and Asset Disposal Regulations, 2020, and the *Fair Administrative Action Act*.
58. The Board asserts that the Applicant has not demonstrated any illegality, irrationality, procedural impropriety, or bias in the decision-making process as would warrant judicial interference.
59. The 1st Respondent filed written submissions dated 15th October, 2025.
60. On the issue of jurisdiction, the 1st Respondent submits that the Applicant’s request for review arose from Tender No. EOI No./AMREF/11/02/2025/005-01, relating to the design and refurbishment of Biosafety Level 2 and 3 laboratories at the National Public Health Laboratory under a Global Fund Grant.
61. Upon full consideration of the pleadings, evidence, and applicable law, the Board determined that the 3rd Respondent, AMREF Health Africa, did not qualify as a “public entity” within the meaning of Section 2 of the Act and that its procurement activities were not conducted using public funds appropriated through the national budgetary framework.
62. The Board further found that the Global Fund grant constituted a donor-funded project implemented through non-state principal recipients and therefore fell squarely within the statutory exemptions under Section 4(2)(f) of the Act, which excludes procurements conducted under bilateral or multilateral arrangements between the Government of Kenya and a foreign government or agency.



63. Consequently, the Board correctly held that it lacked jurisdiction to entertain the Applicant’s request for review, the procurement in question not constituting “public procurement” as envisaged under the Act.
64. Reliance is placed in the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1. Having found that the procurement process was exempted by law, the Board’s decision to decline jurisdiction was, in the 1st Respondent’s view, lawful, reasonable, and necessary to uphold the statutory limits imposed by Parliament.
65. It is further submitted that the Board acted within its mandate under Section 173 of the Act and exercised its powers judiciously and in good faith.
66. With respect to procedural fairness, the 1st Respondent maintains that the Board acted lawfully in entertaining a preliminary objection raised by the 3rd Respondent without insisting on a substantive response. Under Regulation 209(1) of the Public Procurement and Asset Disposal Regulations, 2020, a party “may” raise a preliminary objection within three days of being notified of a review hearing; the use of the word “may,” it is argued, denotes discretion, not compulsion.
67. The Board correctly interpreted this provision to allow a party to raise a pure point of law touching on jurisdiction at any stage prior to the hearing.
68. It submits that, the objection was properly raised and determined, and its resolution was a necessary preliminary step before delving into the merits of the matter.
69. The 1st Respondent further submits that the decision rendered in Request for Review No. 91 of 2025 was lawful, reasonable, and procedurally fair within the meaning of Article 47 of *the Constitution* and Sections 4, 7, and 11 of the *Fair Administrative Action Act*, 2015.
70. The Board afforded all parties an opportunity to be heard, received written and oral submissions, and rendered a detailed, reasoned determination based on the record before it.
71. The proceedings were conducted in accordance with Regulation 218 of the 2020 Regulations, which exempts the Board from the strict rules of evidence and allows it to adopt procedures best suited to ensure fair and expeditious resolution of review proceedings.
72. This flexibility, the Respondent argues, is consistent with the quasi-judicial nature of the Board’s mandate and the constitutional principles of administrative justice.
73. In the 1st Respondent’s view, its interpretation of Section 4(2)(f) of the Act was sound in law and consistent with the statutory purpose of distinguishing public procurement from donor-driven or multilateral arrangements.
74. The decision was therefore not ultra vires, arbitrary, or unreasonable but rather reflected fidelity to the law and respect for jurisdictional boundaries.
75. The 1st Respondent further contends that the orders of certiorari, mandamus, and prohibition sought are not merited. The Applicant has failed to establish any of the recognized grounds for judicial review as set out in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 and Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300. The Application offends the well-settled principle that judicial review is a supervisory remedy, not a substitute for an appeal. The Court, sitting as a judicial review court, cannot re-evaluate the merits or substitute its decision for that of the Board.



The 2nd Respondent's Case;

76. According to the 2nd Respondent, the Applicant's case discloses no illegality, irrationality, or procedural impropriety on its part capable of invoking this Court's supervisory jurisdiction under Articles 47 and 165(6) of *the Constitution* or Section 7(2) of the *Fair Administrative Action Act*.
77. It is contended that the Ministry acted lawfully, rationally, and within its constitutional and statutory mandate under Articles 43(1)(a), 187, and 201 of *the Constitution* in collaborating with development partners and non-state actors, including the 3rd Respondent, to enhance delivery of public health programmes.
78. The 2nd Respondent asserts that AMREF Health Africa, the 3rd Respondent, is not a public entity within the meaning of Section 2(q) of the *Public Procurement and Asset Disposal Act*, 2015 (PPADA).
79. It is a Non-Governmental Organization duly registered under the NGO Coordination Act and functions as a non-state Principal Recipient and implementing agency of the Global Fund grant.
80. AMREF operates independently, is not under the control of the Government of Kenya, and its operations are financed through Global Fund resources not public funds appropriated through the national budget.
81. Accordingly, the 2nd Respondent submits that the provisions of the PPADA apply only to public entities and cannot be extended to cover donor-funded entities governed by distinct international procurement frameworks.
82. Further the 2nd Respondent asserts that the Ministry of Health is a public body established under the Executive authority of the national government and mandated, under Article 43(1)(a) of *the Constitution* and Executive Order No. 1 of 2023, to formulate and implement national health policy, coordinate health sector activities, and manage public health programmes.
83. In discharging this constitutional function, the Ministry is empowered to undertake procurement of goods and services in accordance with the PPADA and attendant Regulations.
84. However, the Ministry's engagement with AMREF in the implementation of the Global Fund grant was limited to policy guidance, technical oversight, and coordination to ensure alignment with national health priorities, and not participation in, or control of, AMREF's procurement processes.
85. The 2nd Respondent denies any wrongdoing, contending that no evidence has been adduced to show that it acted ultra vires, unreasonably, or in bad faith.
86. It maintains that the Applicant's assertions are speculative and misconceived, contrary to the established parameters of judicial review which confine the Court to questions of illegality, irrationality, or procedural impropriety.
87. It is argued that the prayer to restrain it from participating in procurement processes involving public assets is without factual or legal foundation and, if granted, would unjustifiably cripple its constitutional mandate and undermine the public's right to health under Article 43(1)(a). Judicial review remedies, particularly prohibition, cannot issue to prevent a lawful authority from exercising functions expressly conferred by statute.
88. According to the 2nd Respondent the Applicant's attempt to subject AMREF and the Global Fund procurement processes to the domestic regime under the PPADA is legally untenable and contrary to both constitutional and international law. Under Article 2(5) and (6) of *the Constitution*, general



- rules of international law and treaties ratified by Kenya form part of Kenyan law. Kenya, through the Ministry of Health, is a signatory to the Global Fund Framework Agreement, which establishes independent governance, financial, and procurement procedures applicable to all Global Fund grants.
89. Section 4(2)(f) of the PPADA expressly exempts from its Application any procurement governed by the terms of a grant or agreement between the Government of Kenya and a foreign government, multilateral agency, or organization, unless otherwise provided in such agreement.
 90. In this regard, the 2nd Respondent posits that AMREF's procurement activities are governed by the Global Fund Procurement and Supply Management (PSM) Guidelines, incorporated into Kenya's obligations under the National Treasury Grant Implementation Agreement.
 91. The Global Fund Regulations designate implementing partners such as AMREF as non-state Principal Recipients, operating under independent financial and procurement controls designed to ensure transparency and accountability.
 92. Subjecting such processes to domestic oversight by the Public Procurement Regulatory Authority (PPRA) or the Public Procurement Administrative Review Board (PPARB) would amount to an unlawful encroachment on the jurisdiction of an international mechanism and would contravene both Article 2(6) of *the Constitution* and Section 4(2)(f) of the PPADA.
 93. The 2nd Respondent relies on National Treasury Circular No. 20/2019 on "Implementation of Donor-Funded Projects," which reiterates that where donor-funded projects are governed by distinct procurement frameworks, those frameworks prevail unless expressly waived by the donor.
 94. The 2nd Respondent therefore maintains that its collaboration with AMREF in implementing the Global Fund grant does not confer control or transform AMREF into a public entity.
 95. Participation of Ministry officers in oversight or coordination roles does not amount to a "controlling interest" as contemplated under Section 2(q) of the PPADA.
 96. In sum, the 2nd Respondent contends that it did not engage in, direct, or control any procurement process undertaken by the 3rd Respondent, and its role was confined to ensuring that donor-funded health interventions align with national policy.
 97. According to them, the Application before this honourable court offends the principle of separation of functions, Kenya's international obligations under the Global Fund Framework, and the exemption clause in Section 4(2)(f) of the PPADA.
 98. The orders sought, if granted, would be contrary to public interest, as they would impede ongoing donor-funded health programmes and disrupt the delivery of essential healthcare services to the public.
 99. The 2nd Respondent filed its submissions dated 15th October 2025 in opposition to the Applicant's Notice of Motion dated 19th September 2025, and in particular, to prayer number 6 thereof, by which the Applicant seeks an order of prohibition restraining the Ministry of Health from participating in or engaging in any procurement processes involving public assets in collaboration with the 3rd Respondent, AMREF Health Africa, unless such private entities are licensed by the Public Procurement Regulatory Authority (PPRA) or made subject to the jurisdiction of the Public Procurement Administrative Review Board (PPARB).
 100. The 2nd Respondent contends that the said prayer is framed in broad and unrestrained terms, extending well beyond the scope of the impugned review proceedings, and that, if granted, it would impermissibly encroach upon and impede the lawful exercise of the Ministry's constitutional and statutory mandate under Article 43(1)(a) of *the Constitution* and the *Public Procurement and Asset Disposal Act*, 2015.



101. It explains that although it did not participate in the proceedings before the 1st Respondent, its inclusion in the present proceedings is necessitated by the far-reaching implications of the orders sought, which touch upon its core policy, operational, and administrative responsibilities.
102. It is argued that the Application seeks to curtail legitimate partnerships between the Ministry and development partners such as AMREF by imposing regulatory requirements that have no legal basis.
103. It is submitted that requiring AMREF to obtain licensing from the PPRA or subjecting donor-funded procurements to the PPARB's jurisdiction would introduce unnecessary bureaucratic constraints contrary to the constitutional principles of efficiency, effectiveness, and good governance under Article 232(1)(b) of *the Constitution*.
104. Such restrictions, the Ministry contends, would unjustifiably hinder its ability to engage constructively with non-state actors in implementing essential public health programmes and undermine the right to health guaranteed under Article 43(1)(a) of *the Constitution*.
105. It is submitted that the 2nd Respondent's collaboration with AMREF is lawful, rational, and anchored in both constitutional and statutory frameworks, including Article 43(1)(a) of *the Constitution* and Sections 5 and 6 of the *Public Finance Management Act*, 2012.
106. The Ministry's actions, it submits, are guided by public interest considerations in promoting access to healthcare services.
107. It is further argued that under Section 2(q) of the PPADA, a public entity must be created by law, controlled by government, or financed by public funds. AMREF Health Africa, being a Non-Governmental Organization registered under the NGO Coordination Act, does not meet any of these criteria and therefore falls outside the ambit of the PPADA.
108. The 2nd Respondent further relies on Section 4(2)(f) of the PPADA, which expressly exempts procurements governed by grants, loans, or agreements between the Government of Kenya and foreign or multilateral agencies from the Application of the Act.
109. It is submitted that the Global Fund operates under its own Procurement and Supply Management (PSM) Framework, which binds Kenya under Article 2(6) of *the Constitution*. The Ministry's partnership with AMREF, as the Global Fund's non-state Principal Recipient, is therefore governed by international obligations and donor-specific frameworks, not domestic procurement law. Subjecting such arrangements to the PPADA, it is argued, would offend Kenya's international commitments and disrupt the efficient implementation of donor-funded health programmes.
110. It is its submission that the Application is misconceived, legally untenable, and devoid of merit, having failed to demonstrate any illegality, unreasonableness, or procedural impropriety on the part of the Ministry under Articles 47 and 165(6) of *the Constitution* or Section 7(2) of the *Fair Administrative Action Act* and therefore the 2nd Respondent prays that the Application be dismissed with costs and that this Court affirms that it acted within its mandate and in full compliance with Kenya's international obligations.

The 3rd Respondent's Case;

111. The 3rd Respondent, AMREF Health Africa, in opposing the Application argues that it is a Non-Governmental Organization dedicated to improving healthcare across Africa and operates as a private entity, not subject to the provisions of the *Public Procurement and Asset Disposal Act*, 2015 (PPADA).



112. It invited bids through an open tender, EOI No. AMREF/11/02/2025/005-01, for the design, refurbishment, and equipping of biosafety laboratories at the National Public Health Laboratory.
113. The Applicant was among six bidders who submitted proposals but was notified by a letter dated 29th July 2025 that its bid was unsuccessful.
114. Dissatisfied, the Applicant filed Request for Review No. 91 of 2025 before the Public Procurement Administrative Review Board (PPARB), alleging breaches of sections 38, 58, 64, 70 and 86(1) of the PPADA.
115. The 3rd Respondent raised a Preliminary Objection dated 20th August 2025, contending that the PPARB lacked jurisdiction as the Procuring Entity was a private organization not bound by the PPADA.
116. It further filed, in the alternative, a substantive response on 25th August 2025, maintaining that no procurement award had been made and that the Request for Review was premature and incompetent.
117. Upon hearing the parties, the Board, in its decision dated 2nd September 2025, upheld the Preliminary Objection and struck out the Request for Review for want of jurisdiction.
118. The Board found that the 3rd Respondent was not a public entity and that the procurement in question did not involve public funds.
119. It held that the jurisdiction of the Board flows from section 167(1) of the Act and only extends to procurements governed by the PPADA. In the absence of public funds or government control, the Board concluded that the tender did not constitute public procurement within the meaning of the Act. It therefore held that it was “divested of jurisdiction to entertain the instant Request for Review” and accordingly “downed its tools,”
120. The 1st Respondent also determined that even if the Global Fund grant were to be considered public money, the same would fall under the exemption in section 4(2)(f) of the PPADA, being procurement under a bilateral or multilateral agreement, thereby excluding it from the Board’s jurisdiction.
121. It further found that no evidence was tendered showing that the Government of Kenya had any controlling interest, shareholding, or management control in the 3rd Respondent.
122. The 3rd Respondent posits that allegations by the Applicant of bias, irrationality, or premeditation on the part of the Board were unsubstantiated.
123. The 1st Respondent, it was argued, properly exercised its discretion and considered all material before it. It also defended the filing of its substantive response outside the five days prescribed under Regulation 209(1) of the Public Procurement and Asset Disposal Regulations, 2020, noting that the Board, at paragraphs 110–113 of its decision, found the same properly on record and that no prejudice was occasioned to the Applicant.
124. On the issue of alleged bias arising from oral clarifications made by the 3rd Respondent’s Programme Director, Dr. George Githuka, it maintained that both parties were accorded equal opportunity to provide clarifications, and no objection was raised by the Applicant during the hearing.
125. Substantively, the 3rd Respondent asserted that the procurement process was conducted transparently, through open advertisement, and that evaluation was carried out strictly in accordance with the tender documents.



126. It was contended that the Applicant's bid was fully considered at both technical and presentation stages but ultimately found unsuccessful based on the evaluation criteria.
127. The 3rd Respondent emphasized that judicial review proceedings are concerned with the decision-making process, not the merits of the decision, save to the extent permitted under the Fair Administrative Action Act, 2015.
128. It was further argued that the Applicant's attempt to reintroduce the merits of the procurement process amounted to inviting the Court to sit as an appellate forum over the PPARB, contrary to established principles.

Analysis and Determination;

Following are the issues for determination:

1. Whether the parties have been properly sued.
2. Whether the Applicant's right to fair hearing were violated
3. Whether the Application has merit.
4. Who shall bear the costs.

Whether the parties have been properly sued.

129. Under The Public Procurement and Asset Disposal Act, 2015 ("the Act"), the proper Respondent in judicial review proceedings is the Board itself. All the other parties such as the procuring entity or tenderers ought to be joined as interested parties.
130. Public procurement proceedings are special in nature. The proceedings are not guided by the Civil Procedure Rules. This is so because under Section 5 of the Public Procurement and Asset Disposal Act all other legislation must yield to Public Procurement and Asset Disposal Act whenever there is a conflict.
131. According to the PPAD Act, only the 1st Respondent is capable of being sued as a principal party who is the decision maker in public procurement case at the administrative review stage.
132. It is the administrative decision that informs all the causes of action that are escalated to the High Court under Section 175 of the Public Procurement and Asset Disposal Act for purposes of Judicial Review hearing and determination.
133. The other parties are classified as interested parties for obvious reasons. They don't make decisions. They participate in the bidding process.
134. It is the board that pronounces or determines all public procurement disputes at all the public procurement stages before parties move this court and not the interested parties.
135. Further, the legal status of legal entities like companies, Non-Governmental Organisations, Parastatals or business entities is guided by very elaborate legal frameworks like the Companies Act and not by the conduct of parties.
136. This court can only review the question whether the 1st Respondent's decision was arrived at in violation of the rules of natural justice, illegally or in a procedurally ailing process that is so fatal as to render the entire determination susceptible to setting aside.



137. The court has nothing to determine against the other parties. The question that is usually before The Judicial Review Division of the High Court in Public procurement cases are usually around the question of the legality or lack of it of the 1st Respondent's decisions.
138. Having found that only the 1st Respondent is capable of being sued as a principal party, then the cases against the 2nd and 3rd Respondents amount to a fatal misjoinder.
139. Consequently, the cases against the 2nd and 3rd Respondents are stuck out.
140. Given that the 1st Respondent has been properly sued, the court shall then proceed against it since the case against the 1st Respondent survives.

The next issue is whether the Application has merit.

141. In determining this issue, the court has looked at the 3rd Respondent legal status.
142. It is not disputed that the 3rd Respondent, is a Non-Governmental Organization dedicated to improving healthcare across Africa and operates as a private entity.
143. It was in arrangement with the 2nd Respondent that informed the impugned procurement process.
144. Though the court has already made a finding that the 3rd Respondent wasn't properly sued, in deciding the case against the 1st Respondent the court has looked at a couple of concerns that were in the 1st Respondent's custody when it arrived at the impugned decision.
145. It is not for instance not in doubt that the 3rd Respondent, is not a public entity within the meaning of Section 2(q) of the *Public Procurement and Asset Disposal Act, 2015* (PPADA).
146. It is a Non-Governmental Organization duly registered under the NGO Coordination Act and functions as a non-state Principal Recipient and implementing agency of the Global Fund grant.
147. The 3rd Respondent operates independently, and it is not under the control of the Government of Kenya, and its operations are financed through Global Fund resources not public funds appropriated through the national budget.
148. It is this court's finding that the provisions of the PPADA Act apply only to public entities and cannot be extended to cover donor-funded entities governed by distinct international procurement frameworks.
149. It is this court's finding and I so hold that in arriving at the impugned decision, the Board framed and determined issues relating to the competence of the preliminary objection, the admissibility of responses, and, crucially, whether the procurement constituted "public procurement" within the meaning of Sections 2, 4 and 167(1) of the Act.
150. In its analysis, the Board held that its jurisdiction flows solely from the Act and that, for it to be vested with jurisdiction, the procuring entity must be a public entity utilizing public funds within the framework of the *Public Finance Management Act* and subject to approved budgetary processes.
151. The Board found no evidence that the 2nd or 3rd Respondents had an accounting officer or an approved budget under the Act governing the use of Global Fund grants.
152. It further found that the Global Fund, being a multilateral financing mechanism, operates under a bilateral or multilateral agreement between the Government of Kenya and an external donor, which is expressly exempted from the Application of the Act under Section 4(2)(f).



153. Consequently, the Board held that the 3rd Respondent, was not a public entity but a non-state implementing agency of the Global Fund, and its collaboration with the Ministry of Health did not render it a public entity or indicate governmental control.
154. The Board also noted that AMREF's internal procurement policy was distinct from the regime under the Act and Regulations, thereby confirming that the procurement in question did not constitute public procurement.
155. In the circumstances this court is of the informed finding and I so hold that the Applicant has not demonstrated any illegality, irrationality, procedural impropriety, or bias in the 1st Respondent decision-making process as would warrant judicial interference.
156. The court is satisfied that the 1st Respondent had justifications and reasons to decline jurisdiction within the principles as enunciated in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1.
157. Having found that the procurement process was exempted by law, the court is of the informed view that the Board's decision to decline jurisdiction was lawful and I so hold.
- The next issue is whether the secretariat initial decline to accept the Applicant's filing was illegal;
158. It is the Applicant's case that upon first presentation of the Application, the Board's secretariat declined to accept the filing, alleging lack of jurisdiction over AMREF Health Africa on account of its private status.
159. The Applicant argued that its counsel protested the rejection, prompting the secretariat to later admit the Application on 14th August 2025 which was in any event, two days after the initial attempt to file forcing the Applicant to pay the requisite filing fees of Kshs. 40,000 and an administrative charge of Kshs. 5,000, as required under the Public Procurement and Asset Disposal Regulations, 2020.
160. The Applicant is also aggrieved that it was later required to pay additional filing fees of Kshs. 160,000/ = after disclosure that the estimated tender sum was USD 2,000,000, an amount initially withheld.
161. It is this court's finding that the overcharging and the initial rejection by the secretariat on grounds of jurisdiction were administratively wrong.
162. However, that on its own could not have gone into the merits of the case before the board given that in any event the board lacked jurisdiction ab initio.
163. On another front in answering whether the Application has merit, the court notes that the Applicant also sought an order that;

“This Court be pleased to grant the ex-parte Applicant an order of prohibition seeking to stop the 2nd Respondent from further participating in and/ or engaging in procurement processes involving public assets and the 3rd Respondent without having such private entities being licensed by the Public Procurement Regulatory Authority or declaring such procurements to be subject to the jurisdiction of the 1st Respondent.”



164. In determining this sub issue, this court is guided by the case of Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [20221 eKLR, where the Court rendered itself thus:

“The Order of “Prohibition” issues where there are assumptions of unlawful jurisdiction or excess of jurisdiction. It’s an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi’s Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction.

“Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition. Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself.”

165. The court has looked at the nature of the relationship between the 2nd and 3rd Respondents. It is guided by a formal agreement, entered into by the two entities. The court has no business rewriting the same.
166. The 2nd Respondent has a Constitutional duty to uphold, promote and fulfill the rights of Kenyans under the Article 43 of *the constitution* which include the right to health housing inter alia.
167. The court finds no legally sound justification as to why this court should prohibit the 2nd Respondent from engaging with non-state actors in discharging, delivering or implementing essential public health programmes. Issuing the order as sought will undermine the steps that the Government is taking towards the promotion of the Kenyans right to health as guaranteed under Article 43(1)(a) of *the Constitution*.
168. This court cannot issue an order prohibiting the 2nd Respondent from discharging its Constitutional mandate, duties and obligations, especially where an Applicant like in this case has not proven that the concerned exercise has flouted the law.
169. In providing the services like the ones in the instant suit through the unique procurement arrangement and process in a collaboration with the 3rd Respondent the 2 nd Respondent is advancing and promoting Article 43 within the Article 227 of *the constitution* framework and I so hold.
170. The effect of granting the prohibition order stopping a procurement process or the service delivery forming the subject of the impugned service delivery that is not regulated by the *public procurement and asset disposal act* will amount to the violation of the rights of many innocent Kenyans.
171. This court lacks the jurisdiction to issue such an order given that it’s jurisdiction is guided by the provisions of The PPAD Act which does not regulate private procurement processes like the impugned one.
172. In any event, the Applicant has not sought to invoke Article 25 of *the Constitution* in its bid to limit the power of the 2nd Respondent.
173. Further ,and on another sub issue under the analysis whether the Application has merit the court now looks at the prayer where the Applicant seeks the grant of an order that Court be pleased to grant the ex-parte Applicant an order declaring the rights of parties herein with respect to the



- 3rd Respondent's Tender No. EOI NO./AMREF/11/02/2025/005-01 for Proposed Design Works, Refurbishment And Equipping Of Biosafety Level 3 (bsl3} And Refurbishment Of Biosafety Level 2 (bsl2} Laboratories At The National Public Health Laboratory(block-b} For The Division Of National Laboratoryservices, Ministry Of Health (Re-advertisement} by compelling the 3rd Respondent to declare the ex-parte Applicant as the successfulbidder therein having demonstrated capacity to perform the contract within the prescribed timeframe as well as being the bidder with the lowest evaluated financial proposal.
174. The court finds it difficult to grant this order since the court already struck out the suit against the 3rd Respondent as a result of which no declaration can issue against such a non party.
175. Further, the court cannot issue such an order given that it already made a finding that the procurement in issue is exempted from the provisions of the *Public Procurement And Asset Disposal Act*.
176. The long and short of that is that this court lacks jurisdiction to issue such an order under Section 175 of the PPAD Act and I so hold.
177. The Applicant's prayer that this Court be pleased, as an alternative to prayer 2 hereinabove, do grant the ex-parte Applicant an order of mandamus compelling the Public Procurement Administrative Review Board, the 1st Respondent herein, to take up jurisdiction over the 3rd Respondent's Tender No. Eoi No./amref/11/02/2025/005-01 For Proposed Design Works, Refurbishment And Equipping Of Biosafety Level 3 (bsl3} And Refurbishment Of Biosafety Level 2 (bsl2} Laboratories At The National Public Health Laboratory (block-b) For The Division Of Nationallaboratoryservices, Ministry Of Health (Re-advertisement) and decide the request for review Application which had been filed before it on its merits.
178. For the reasons highlighted earlier in this judgment, this court has no statutory underpinning or jurisdiction that would enable it to issue an order of Mandamus to compel the 1st Respondent herein, to take up jurisdiction over the 3rd Respondent's Tender No. EOI NO./AMREF/11/02/2025/005-01.
179. Jurisdiction flows from *the constitution* and legislation. This court cannot arrogate to itself or to the 1st Respondent jurisdiction where none exists.
180. To grant this order would mean that the court will have conferred jurisdiction where none exists in Law.
181. Granting this alternative order will be contrary to explicit statutory provisions, and the exemptions thereto that regulate public procurement, and in particular the Public Procurement And Assets Disposal Act and I so hold.
182. The Applicant also sought an order that this Court be pleased to grant the ex-parte Applicant an order of mandamus compelling the Public Procurement Administrative Review Board, the 1st Respondent herein, to strike out the substantive responses filed by the 3rd Respondent herein after the lapse of time without leave and proceed with the matter as being unopposed.
183. Having found that the 1st Respondent properly upheld and settled, the legal position that it did not have jurisdiction over the procurement process, it would be improper and illegal for this court to then proceed to grant an order that the 1st Respondent herein, to strike out the substantive responses filed by the 3rd Respondent herein after the lapse of time and I so hold.
184. In any event, the court already made a finding that the 2nd and 3rd Respondents are not proper parties to this suit having been sued in the capacity of Respondents, striking out the suit against them. This order cannot be issued.



Who shall bear the costs: The Applicant seeks for an order of costs.

185. In *Joseph Oduor Anode v. Kenya Red Cross Society*, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR Odunga, J. thus observed:

“...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the *Civil Procedure Act*] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ...” [emphasis supplied].

186. In *Kenya National Examination Council v. Republic Exparte Geoffrey Gathenji Njoroge*, NS, J W, R N, G W, A W, C W, B W, S N & J B (1997) JELR 100019 (CA), addressed the scope of Application of an order of Mandamus the court stated;

“The next issue we must deal with is this: What is the scope and efficacy of an Order Of Mandamus” Once again we turn to Halsbury’s Law Of England, 4th Edition Volume 1 at page 111 From Paragraph 89. The learned judges had this to say:

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated: “The order must command no more than the party against whom the Application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

187. The Applicant shall bear the cost of the suit.

Disposition;

188. The Application lacks merit. The impugned decision of the Board as rendered on 2nd September 2025, upholding the 3rd Respondent’s preliminary objection and striking out the request for review for want of jurisdiction was legal.

Order:

The Application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER 2025.



.....
J. CHIGITI (SC)
JUDGE

